IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 18TH SEPTEMBER 2007 / 27TH BHADRA 1929

WA.No. 692 of 2004(E)

(AGAINST THE JUDGEMENT IN OP.37280/2002 Dated 24/11/2003)

APPELLANT/ 5TH RESPONDENT

INTER DENOMINATIONAL CHRISTIAN
FELLOWSHIP, REGISTER NO.A39/84, ST.GEORGE NAGAR,
MANNAR.P.O., ALAPPUZHA DISTRICT, REPRESENTED
BY ITS PRESIDENT, SHRI.N.GEEVARGHESE.

BY ADV. SRI.P.JACOB VARGHESE.
SRI.VIVEK VARGHESE P.J.

RESPONDENTS/PETITIONERS & RESPONDENTS 1 TO 4:
---

1. NARAYANAN, NECHIKKATTU HOUSE,
KURATTIKKADU MURI, MANNAR, VILLAGE, ALAPPUZHA
DISTRICT.

2. N.KRISHNANKUTTY, AJITH BHAVAN,
KUTTAMPEROOR, ALAPPUZHA DISTRICT.

3. STATE OF KERAL REPRESENTED BY THE
SECRETARY TO LOCAL SELF GOVERNMENT DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

4. MANNAR GRAMA PANCHAYATH REPRESENTED BY
ITS SECRETARY, MANNAR.P.O., ALAPPUZHA DISTRICT.

5. DISTRICT COLLECTOR, COLLECTORATE,
ALAPPUZHA.

6. ADDITIONAL DISTRICT MAGISTRATE,
COLLECTRORATE, ALAPPUZHA.

BY SPL. GOVERNMENT PLEADER SHRI C.T. RAVIKUMAR.
R4 BY ADV. SHRI M.R. HARIRAJ.
BY ADV. SRI.N.SUKUMARAN
ADV. SRI.S.SHYAM
ADV. SRI.N.K.KARNIS
ADV. SRI.BOBBY MATHEW KOOTHATTUKULAM
ADV. SRI.LATHEESH SEBASTIAN
ADV. SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)
ADV. SMT.REKHA VASUDEVAN
ADV. SRI.SURAJ.S
ADV. SMT.VINEETHA B.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 12/07/2007, THE COURT ON 18/09/2007 DELIVERED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN,J.

W.A. NO. 692 OF 2004

Dated this the 18th September, 2007

JUDGMENT

SANKARAN, J.

The appellant is the fifth respondent in O.P.No.37280 of 2002, filed by respondents 1 and 2 herein, challenging Ext.P1 order dated 16.3.2001 passed by the Additional District Magistrate, Alappuzha and Ext.P4 order dated 13.11.2002 passed by the Government.

2. Inter Denominational Christian Fellowship, the appellant herein, submitted an application dated 16.9.1998 for granting a licence to open and maintain a concrete burial vault in 131.8 sq. metres of land comprised in Sy.No.325/42 of Mannar Village in Chengannur Taluk. The Mannar Grama Panchayat in its resolution dated 23.10.1998 recommended the application. The District Medical Officer in his report dated 26.12.1998, stated that there are no dwelling houses within a distance of 25 metres of the site where the vault was proposed to be constructed. It was also reported that there is no water supply within a radius of 100 metres of the site. The District Medical Officer recommended to issue No Objection Certificate for the construction of the concrete vault.

3. The District Collector published notice under Section 6(7)

of the Kerala Panchayat Raj (Burial and Burning Grounds) Rules, 1998 (hereinafter referred to as 'the Rules'), in the Malayala Manorama daily dated 7.4.1999, calling for objection, if any, against the granting of licence for opening the concrete burial vault in the proposed land. Objections were received against the granting of licence. The Revenue Divisional Officer was directed to conduct an enquiry. After enquiry, the Revenue Divisional Officer submitted his report dated 13.2.2001. Thereafter, the Additional District Magistrate, Allappuzha conducted hearing after issuing notice to the persons concerned and Ext.P1 order dated 16.3.2001 was passed granting sanction under sub-rule (8)(a) of Rule 6 of the Rules to construct the concrete vault. The following conditions were also imposed in Ext.P1 order and it was held that the licence will be issued only after the fulfilment of the conditions. The conditions are the following:

> "1. The vault should be constructed under the supervisions of a qualified engineer.
>
> 2. Each Cell should be constructed with 3' x 7' x 3' diamentions.
>
> 3. The bottom of every vault should be constructed with side walls on all sides at a height of 3 feet with concrete slab covering.
>
> 4. The entrance should have gate with lock."

4. Challenging Ext.P1 order, one Sreedharan filed an appeal before the Government under Rule 6(10) of the Rules. The appeal

was dated 3rd April, 2002. The Government disposed of the appeal as per Ext.P4 order dated 13th November, 2002, confirming Ext.P1 order and upholding the granting of licence to construct the vault.

5. The learned single Judge allowed the Original Petition on the ground that Ext.P1 order was passed in violation of Rule 6(9) of the Rules. Rule 6(9) reads thus:

> "The District Collector shall pass an order under sub-rule (8) within six months from the date of receipt of the application and shall inform the same to the concerned Panchayat."

The learned single Judge relied on the decision of the Full Bench in **Surendran** v. **District Collector** (1999 (3) KLT 22 (F.B.)), wherein it was held that Rule 6(9) is mandatory and that if the application is not finally disposed of within the time limit prescribed therein, the District Collector becomes functus officio.

6. In the decision in 1999 (3) KLT 22 (F.B.) [supra], the Full Bench was considering Rule 6(8) of the Panchayat (Burial and Burning Grounds) Rules, 1967 (Kerala). Sub-rule (8) of Rule 6 of the 1967 Rules reads as follows:

> "(8) The Collector shall in every case pass an order under sub.r.(7) within a period of six months from the date of submission of the application to the Panchayat and if no such order is passed by the Collector within the said period, the licence applied

> for shall be deemed to have been granted and the applicant may proceed to use the site for the purpose of disposal of the dead but not so as to contravene any of the provisions of these rules or the byelaws made under the Act."

7. In another Division Bench decision in **Marykutty Mathew** v. **St.Thomas Orthodox Cathedral** (2000 (3) KLT 21), the scope and ambit of sub-rule (9) of Rule 6 of the 1998 Rules came up for consideration. The Division Bench in ***Marykutty Mathew's*** case held that the period of six months under sub-rule (9) of Rule 6 would start running only from the date of receipt of the application by the District Collector. Another Division Bench in **Pentecost Mission** v. **State of Kerala** (2006 (4) KLT 153), while considering the scope and ambit of Rule 6(9) of the 1998 Rules, considered the Full Bench decision in 1999 (3) KLT 22, the Division Bench decision in 2000 (3) KLT 21 and other decisions. In ***Pentecost Mission's*** case, the District Collector received the application on 26.11.2001. He called for a report from the Tahsildar. There were certain mistakes in the report of the Tahsildar. A fresh report was called for and Tahsildar submitted another report dated 7.8.2002. Another report of the District Medical Officer was also received on 8.11.2002. The District Collector granted the licence as per order dated 25.11.2002. The Division Bench in ***Pentecost Mission's*** case, on the basis of these facts, held thus:

> "The receipt of application necessarily means a complete application on which the District Collector is entitled under law to apply his mind. The limitation may thus be six months from the date of receipt of the application, but we hold that the *terminus a quo* would be when the application is complete in all regards."

After considering all the relevant decisions on the point, the Division Bench in ***Pentecost Mission's*** case held as follows:

> "A comparison of the Rules of 1967 and 1998 would show that whereas, under sub-r.(8) of R.6 of 1967 Rules the Collector has, in every case, to pass an order under sub-r.(7) within a period of six months from the date of submission (emphasis supplied) of application to the Panchayat and if no such order is passed by the Collector within the said period, the licence applied for shall be deemed to have been granted; under sub-r.(9) of 1998 Rules, the District Collector shall pass an order within six months from the date of receipt of the application and shall inform the same to the concerned Panchayat. The *terminus a quo,* so as to compute the period of six months, would start from the date of submission of application to the Panchayat under the 1967 Rules, but it would commence from the date of receipt of application by the District Collector under the 1998 Rules. We may mention here that a part of sub-r.(8) of R.6 of 1967 Rules saying that no order being passed within a period of six months, the licence applied shall be deemed to have been granted was held invalid in Narayanan Thampi v. District Collector (supra), which has been noticed by the learned Full Bench as well. The distinction in rules as noted above was considered by the Division Bench of this Court in Marykutty Mathew v. St.Thomas Orthodox Cathedral (supra), by observing as follows:
>
> > "But, we find there are certain other differences between the provisions contained in sub-r.(8) of R.6 of the

> 1967 Rules and sub-r.(9) of R.6 of the 1998 Rules. In 1967 Rules, the Collector has to pass an order within six months from the date of submission of the application to the Panchayat, whereas in 1998 Rules, the Collector has to pass the order within six months of his receiving the application."

It was also held that,

> "The provisions of 1998 Rules would make it clear that the period of six months would start running only from the date of receipt of the application by the District Collector from the District Medical Officer and not from the date of receipt of application by the Panchayat."

The learned Division Bench by following the dictum of the Full Bench laid down in Surendran v. District Collector (supra) held sub-r.(9) of R.6 of 1998 Rules to be mandatory and not directory, but still permitted the licence by holding that Collector has passed the order within six months of receipt of application by him. The question in the present case, however, is not as to whether the provisions with regard to limitation contained in sub-r.(9) of R.6 of 1998 Rules is mandatory or directory, but as to whether what would be considered to be the date of receipt of application by the District Collector or, in other words, when the t*erminus a quo* for limitation would start. In our considered view, the limitation of six months would start only when the application received by the District Collector is complete in all regards and he is entitled to apply his mind."

We are in respectful agreement with the decision of the Division Bench in **Pentecost Mission** v. **State of Kerala** (2006 (4) KLT 153).

Normally a decision rendered by a Division Bench of the same Court would be binding on another Division Bench.

8. In the case on hand, a detailed enquiry was conducted by the Revenue Divisional Officer as directed by the District Collector. The Revenue Divisional Officer had reported that on the eastern side of the site, there is a paddy field and on the western side, there is a pathway. The southern side of the site is a residential area. There are no houses within a distance of 25 metres of the proposed vault. Rule 5 of the Rules provides that no new burial or burning ground shall be provided within the limit of 50 metres of dwelling houses. The proviso therein states that in the case of concrete vaults and electric crematorium the distance shall be a minimum of 25 metres from dwelling houses. The Revenue Divisional Officer noticed in his report that the construction work of a house was in progress at a distance of five metres on the northern side of the proposed concrete vault. He has reported that the construction was commenced only after the publication of the notification in the Malayala Manorama daily. An opportunity of being heard was afforded by the Revenue Divisional Officer to the persons concerned before submitting his report and all the facts were taken note of.

9. A question would arise whether a subsequent construction within the prohibited distance would be relevant while considering the application for grant of licence under Rule 6. Rule 5(2) of the Rules reads thus:

> "Whether there is any burial and burning place or not within the specified limit from the dwelling house is to be determined by considering the circumstance on the date of application for licence."

On the date of application, construction activity within the prohibited distance was not there. It was only after publication of the notice in Malayala Manorama daily dated 7.4.1999 that the construction activity commenced within the prohibited distance. It is to be noted that the application is dated 16.9.1998. In view of Rule 5(2) of the Rules, it cannot be said that the application is not liable to be granted in view of the prohibition contained in Rule 5. Rule 5(2) is in the nature of an exception to Rule 5(1). The state of affairs as on the date of application alone is relevant for considering the application for opening a new burial ground or burning ground. The existence or otherwise of the dwelling house is to be taken into account with reference to the date of application. A subsequent change in the state of affairs would not entail in the dismissal of the application invoking Rule 5(1).

For the aforesaid reasons, we are of the view that following the

decision in **Pentecost Mission** v. **State of Kerala** (2006 (4) KLT 153), the challenge against Exts.P1 and P4 orders is liable to be rejected. On the facts also, we are of the view that the writ petitioners are not entitled to challenge the grant of licence to the firth respondent/appellant. In the result, we allow the Writ Appeal, set aside the judgment of the learned single Judge and dismiss the Original Petition.

(H.L.DATTU)
Chief Justice

(K.T.SANKARAN)
Judge

ahz/